

1 Abbas Kazerounian Esq, (SBN: 249203)
2 ak@kazlg.com
3 **Kazerouni Law Group, APC**
4 2700 N. Main Street, Suite 1000
5 Santa Ana, CA 92705
6 Telephone: (800) 400-6808
7 Facsimile: (800) 520-5523

8 Robert L. Hyde, Esq. (SBN: 227183)
9 bob@westcoastlitigation.com
10 Joshua B. Swigart, Esq. (SBN: 225557)
11 josh@westcoastlitigation.com

12 **Hyde & Swigart**
13 411 Camino Del Rio South, Suite 301
14 San Diego, CA 92108-3551
15 Telephone: (619) 233-7770
16 Facsimile: (619) 297-1022

17 Other Attorneys on Signature Page

18 Attorneys for the Plaintiffs and Proposed
19 Settlement Class

20 **UNITED STATES DISTRICT COURT**
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 **PATRICIA CONNOR, AND**
23 **SHERI L. BYWATER,**
24 **INDIVIDUALLY AND ON**
25 **BEHALF OF ALL OTHERS**
26 **SIMILARLY SITUATED**

27 **PLAINTIFFS,**

28 **V.**

JPMORGAN CHASE BANK
AND FEDERAL NATIONAL
MORTGAGE ASSOCIATION A/
K/A FANNIE MAE,

DEFENDANTS.

Case No: 10-CV-1284 GPC (BGS)

CLASS ACTION

DECLARATION OF JOSHUA B.
SWIGART IN SUPPORT OF
MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT

DATE: DECEMBER 4, 2014

TIME: 1:30 P.M.

THE HON. GONZALO P. CURIEL

1. I, Joshua B. Swigart, hereby declare I am one of the attorneys for the Plaintiffs in this action, and named as Class Counsel for the Settlement Class in the Court's March 12, 2012 Order preliminarily approving the settlement. I submit this declaration in support of the Joint Motion for Final Approval of the Class Action Settlement. I am licensed to practice law before this court and all California state courts and all federal courts located in the State of California. If called as a witness, I would competently testify to the matters herein from personal knowledge.
2. I am a partner of the law firm of Hyde and Swigart and a counsel of record for Plaintiffs in this matter, appointed as Class Counsel in the Court's Preliminary Approval Order. I am admitted to this Court and am a member of the State Bar of California in good standing.

SUMMARY OF CASE HISTORY AND SETTLEMENT

3. I have been involved in every aspect of this case from inception through the present. I submit this declaration in support of the Plaintiffs' Motion for Final Approval of Class Action Settlement in which Plaintiffs seeks to have the Court approve the agreed-upon settlement payment of a maximum amount of \$11,268,058.00 and a minimum amount of \$7,000,000.00 ("common fund").
4. Patricia Connor brought this matter to the attention of Class Counsel. A Complaint was filed in this Court on June 16, 2010 and an Amended Complaint was filed in this Court on September 10, 2010. Thereafter, Class Counsel initiated a thorough investigation, and conducted relevant factual and legal research. The information learned through this investigation was invaluable during settlement negotiations. Sheri L. Bywater filed a separate case at about the time this case was settled, and it was consolidated with this case for settlement, and her counsel were also made Class Counsel.
5. After filing this action, Class Counsel and JPMorgan Chase Bank ("Chase" or "Defendant") engaged in extensive negotiations including an exchange of

1 letters, emails, and telephone conversations that thoroughly analyzed the
2 relevant legal, social, and factual issues at issue, and explored the parties'
3 respective positions on the merits of the action and viability of class
4 certification.

5 6. Subsequently, both parties exchanged correspondence, including the exchange
7 of relevant information and documents, lists of phone numbers that received
8 the calls to their cell phones, off-site data used during the class period, and
argued their respective positions.

9 7. This case was settled fairly early in the litigation process, a few months after
10 an Early Neutral Evaluation Conference conducted by U.S. Magistrate Judge
11 Skomal. It was learned that that number of number of cell phone numbers
12 called was large, creating a class of 1,718,866 persons. After cleaning the
13 Class Member list of duplicates and other matters related to account
14 borrowers and co-borrowers, only 1,381,406 separate persons were in the
15 larger Class that received the direct mail notice. A Memorandum of
16 Understanding was entered and a Settlement Agreement was then negotiated.
17 At all times, these activities were non-collusive, and conducted at arm's
18 length.

19 8. The original Settlement created a Settlement Fund to be paid by Defendants
20 in a maximum amount of \$9,000,000.00 and a minimum amount of
21 \$7,000,000.00. That original Settlement Fund was to be used to fund: 1) the
22 settlement payments to Class Members, 2) any incentive payments awarded to
23 the named Plaintiffs, 3) any attorneys' fees and costs awarded to Class
24 Counsel, and 4) certain expenses, including notice and claims administration
25 expenses. If a small number of claims were received, a *cy pres* distribution of
26 any amounts remaining - between the "floor" of \$7,000,000.00 and the
27 amounts paid to 1) claimants, 2) the named Plaintiffs, 3) attorneys' fees and
28 costs, or 4) notice and claims administration - would be paid to one or more

1 charitable organizations. However, a sufficient number of claims were filed to
2 make the *cy pres* unnecessary. For Group 1, there was a sliding scale of
3 possible settlement claim payments depending on the number of claims made,
4 with a maximum payment of \$500.00 and a minimum payment of \$25.00;
5 unless, so many claims were submitted to exceed the maximum
6 \$9,000,000.00 less settlement costs, then each claimant would receive a pro
7 rata award. In return for the Settlement Fund, Plaintiffs, on behalf of the
8 proposed Settlement Class (the “Class”), agreed to dismiss the Litigation and
9 unconditionally release and discharge Defendants and other Released Parties
10 from all claims relating to the Litigation.

11 9. As set forth in the Final Approval Memo at pp.7, 9, the claims period for the
12 Group 1 Class Members expired on July 10, 2012. There were 55,629 valid
13 claims filed, resulting in payments of \$69.97 to each claimant, after deducting
14 the actual settlement costs of notice, claims administration and requested
15 attorneys’ fees. The \$7,000,000 minimum “floor” was not exceeded.

16 10. After the case was preliminarily approved by the Court in the Order and after
17 notice was given to Group 1, but prior to a Final Approval hearing the Parties
18 learned through a filed objection to the Settlement that notice was not given to
19 all persons that should have been included in the Settlement Class. The
20 Parties then withdrew their pending motion for Final Approval until it could
21 be determined whether all Class Members had been properly identified
22 through Defendant’s records. After an investigation by Defendant Chase, it
23 was determined that not all Class Members had been identified and given
24 notice of the Settlement. Consequently, a lengthy investigation and data
25 retrieval project conducted over more than a year’s time determined that a
26 substantial number of persons, the Group 2 Settlement Class previously not
27 identified but consisting of 1,653,559 individuals, were also members of the
28 defined Settlement Class and were entitled to be included in the Settlement.

1 11. Subsequently, the parties engaged in an additional mediation session with
2 Magistrate Judge Edward A. Infante Ret., of Jams to resolve the issue of
3 additional compensation for the Group 2 Settlement Class. The Parties then
4 entered into an Amended Settlement Agreement.

5 12. The Group 2 Settlement resulted in: (1) an increase in the maximum from
6 9,000,000 to 11,268,058 (2) an additional \$125,000 in attorneys' fees, subject
7 to Court approval; and (3) up to \$580,500 in additional incremental notice and
8 administration costs.

9 13. This increase in settlement funds for Group 2 allows for each Group 2 Class
10 Member to receive the same \$69.97 cash settlement as Class Members in
11 Group 1.

12 14. As of the time of filing this Declaration, 112,226 valid claims have been
13 received in total for both Group 1 and Group 2, and the estimated pro rata
14 distribution is \$69.97 per class member.

15 15. On March 20, 2014, Plaintiffs filed a Motion for Preliminary Approval for
16 Group 2 which was approved on May 30, 2014, by the Honorable Gonzalo P.
17 Curiel.

18 16. In addition, Class Counsel hired an information technology consultant,
19 Hansen & Levey Forensics, Inc. to assist in the evaluation of the data
20 production and discovery requests and responses. Mr. Hansen reviewed the
21 data, participated in telephone communications with opposing counsel and
22 their information technology persons, and confirmed the accuracy of the
23 processes used and the numbers provided by Chase. *See* the previously filed
24 Declaration of Jeff Hansen in Support of Preliminary Approval, ¶¶ 4-5.

25 17. In the Preliminary Approval Order for Group 2, the Court set the Fairness
26 Hearing for November 14, 2014, which was continued to December 4, 2014,
27 at 1:30 p.m., at the United States District Court for the Southern District of
28

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California, located at 940 Front Street, San Diego, California, 92101 [Dkt Nos. 113, 119].

18. Notice that a fairness hearing would be held was provided to Groups 1 and 2. Group 2 received direct mail notice of the date and time of the hearing. After Group 1 received notice of the first fairness hearing, the continued dart was posted on the class settlement website.
19. Accordingly, the current settlement consists of the following:
 - a. Defendants shall establish a settlement fund with the maximum amount of \$11,268,058.00 (“Settlement Fund”). Any Class Member, including members in both Group 1 and Group 2, that make a timely claim within the time period provided in the notice to Class Members, shall share, pro rata, in the Settlement Fund an approximate amount of \$69.97. This amount is calculated after deducting the Settlement Costs (i.e. 1) reasonable attorney’s fees (\$2,375,000) and litigation costs (\$23,878.58) as approved and awarded by the Court; 2) the costs of notice and claims administration of \$811,738.39 for Group 1 and up to \$580,500 for Group 2; and 3) the proposed Incentive Award of \$5,000.00 to be divided evenly between the two Plaintiffs for their efforts in litigating this case).
 - b. Plaintiffs Patricia Connor and Sheri L. Bywater have applied to the Court by separate motion for an incentive award of \$5,000.00, to be divided evenly, for their service as Class Representatives in this action. Any incentive awards approved by the Court will be paid from within the Settlement Fund.
 - c. The costs of notice by mail and claims administration will be deducted from the Settlement Fund. Those costs have recently been calculated to be \$811,738.39 for Group 1 and up to \$580,500 for Group 2.
 - d. Class Counsel has also filed a motion to be heard at the same time as the Final Approval hearing for an award of reasonable attorney’s fees and

1 costs, in an amount of \$2,250,000 in attorneys' fees, and for \$23,878.58
2 in litigation costs from the settlement fund. Class counsel seeks an
3 additional \$125,000 in attorneys' fees and litigation costs for group 2. The
4 combined request for attorneys' fees and and litigation costs is

5 20. Taking into account the burdens, uncertainty and risks inherent in this
6 litigation, the Parties have concluded that further prosecution and defense of
7 this action could be protracted, unduly burdensome, and expensive, and that it
8 is desirable, fair, and beneficial to the class that the action now be fully and
9 finally compromised, settled and terminated in the manner and upon the terms
10 and conditions set forth in the Settlement Agreement.

11 21. The Named Plaintiffs and all of their counsel believe that the claims asserted
12 in the Action have merit. However, taking into account the risks of continued
13 litigation, as well as the delays and uncertainties inherent in such litigation
14 and any subsequent appeal, we believe that it is desirable that the Action be
15 fully and finally compromised, settled and terminated now with prejudice,
16 and forever barred pursuant to the terms and conditions set forth in this
17 Settlement Agreement. We have concluded that the terms and conditions of
18 this Settlement Agreement are fair, reasonable and adequate to the proposed
19 class, and that it is in the best interests of the proposed class to settle the
20 Action. I strongly believe, as does each Plaintiff's attorney, that the
21 Settlement should be given final approval.

22 22. Therefore, Class Counsel is requesting that the Court grant Final Approval of
23 the Settlement.

24 **ADEQUACY OF SETTLEMENT:**

25 23. This is a statutory damages case. No Class member has lost any money as a
26 result of the Defendants' actions, other than their carrier's billing them for the
27 cost of Defendants' calls. Therefore, the deterrent effect of statutory damages
28 has been met, and the proceeds will be divided among the persons called. In

1 other words, the Class members are not getting a percentage of money they
2 have expended; they are receiving money as statutory damages for cell phone
3 calls made. Therefore, obtaining an \$11,268,058.00 settlement for the Class to
4 divide is an exemplary settlement. As a result, in my opinion, based upon my
5 experience in civil litigation and in litigating class actions, and based upon the
6 facts of this case, the number of class members, and the other circumstances, I
7 believe this settlement is fair and reasonable. Therefore, I believe the
8 settlement merits Court approval.

9 **CLASS COUNSEL EXPERIENCE:**

10 24. I have outlined my experience in both the Declaration of Joshua B. Swigart in
11 Support of Preliminary Approval of Class Action Settlement Agreement and
12 Declaration of Joshua B. Swigart in Support of Plaintiffs' Motion for Award
13 of Attorneys' Fees and Costs to be heard at the same time as this motion, and I
14 am not repeating it here, for sake of brevity, if the Court is inclined to review
15 my credentials relating to the Final Approval issues.

16 I declare under penalty of perjury that the foregoing is true and correct.

17 Executed on September 29, 2014 at San Diego, California, pursuant to the
18 laws of the United States.

19 /s/ Joshua B. Swigart
Joshua B. Swigart

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